



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**[FHWA Docket No. FHWA-2013-0041]**

**Buy America Policy**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** The FHWA is seeking comments regarding the continued need, in whole or in part, for the general waivers from Buy America for manufactured products; for ferry boat equipment; and for pig iron and processed, pelletized, and reduced iron ores. These waivers have been in effect since 1983, 1994, and 1995, respectively. The FHWA is also seeking comment on the continuing need for the FHWA's minimal use threshold (currently established at \$2,500 or 1/10 of 1 percent of the total contract value, whichever is greater).

**DATES:** Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Late comments will be considered to the extent practicable.

**ADDRESSES:** Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or submit electronically at <http://www.regulations.gov> or fax comments to (202) 493-2251. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification or receipt of comments must include a self-addressed, stamped postcard or

you may print the acknowledgment page that appears after submitting comments electronically. You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (Volume 65, Number 70, Page 19477-78).

**FOR FURTHER INFORMATION CONTACT:** Mr. Gerald Yakowenko, Contract Administration Team Leader, Office of Program Administration, (202) 366-1562, or Mr. Michael Harkins, Office of the Chief Counsel, (202) 366-4928, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

#### **SUPPLEMENTARY INFORMATION:**

##### **Electronic Access and Filing**

This document and all comments received may be viewed online through the Federal eRulemaking portal at: <http://www.regulations.gov>. Regulations.gov is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site. An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: <http://www.archives.gov/federal-register/>, or the Government Printing Office's Web page at: <http://www.gpo.gov/fdsys>.

##### **Regulatory Background**

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated into a Federal-aid highway construction project. The regulation is based on the statutory authority in 23 U.S.C. 313(a) which states:

“Notwithstanding any other provision of law, the Secretary of Transportation shall not

obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title and administered by the Department of Transportation, unless steel, iron, and manufactured products used in such project are produced in the United States.”

The statute provides for the application of the Buy America requirements to any project using Title 23 funding; however, exceptions are provided where the Secretary finds that : 1) the application of the requirement would be inconsistent with the public interest, 2) where materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or 3) that inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent.

Based on the Secretary’s authority to grant waivers from Buy America, the FHWA has issued three general waivers from Buy America. These waivers pertain to manufactured products, ferry boat equipment, and pig iron and processed, pelletized, and reduced iron ores, and have been in effect since 1983, 1994, and 1995, respectively. With this notice, the FHWA is seeking comment regarding whether these waivers continue to be necessary, in whole or in part, and, if so, what limits should be placed on these waivers. Additionally, FHWA’s regulations at 23 CFR 635.410(b)(4) permit the incorporation of foreign steel and iron into a project if the cost of such items does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater. The FHWA is also seeking comment on the continuing need for the provision and, if so, whether the threshold is appropriate.

### **Manufactured Products**

### *General Manufactured Products*

Section 165 of the Surface Transportation Assistance Act (STAA) of 1982, Pub. L. No. 97-424 (1983), is the source legislation for FHWA's Buy America requirements.<sup>1</sup> This statute replaced an earlier statutory version of Buy America from Section 401 of the STAA of 1978, Pub. L. No. 95-599 (1978), that applied to the Federal-aid highway program. Section 165 of the STAA of 1982 was implemented with a November 25, 1983, final rule which implemented FHWA's Buy America regulatory policies now found in 23 CFR 635.410. In the preamble to the 1983 final rule (48 FR 53099), the FHWA summarized and addressed more than 560 public comments, including comments on the FHWA's interim decision to waive the application of Buy America to manufactured products (48 FR 1946), and found that it was in the public interest to waive application of Buy America to manufactured products other than steel and iron manufactured products.

In discussing the rationale for continuing the general waiver for manufactured products in the preamble to the 1983 final rule, the FHWA stated that the agency had issued an identical general waiver for manufactured products in implementing the 1978 Buy America provisions. In issuing the waiver for the 1978 Buy America statute (43 FR 53717 and 45 FR 77455), the FHWA explained that steel was the only significant foreign commodity having a significant nationwide effect on the cost of Federal-aid highway

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<sup>1</sup> Congress codified Section 165 of the STAA of 1982, as amended, at 23 U.S.C. 313 with the enactment of Section 1903 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59 (2005).

construction projects.<sup>2</sup> While natural materials (e.g., sand, stone, gravel, and earth materials) and petroleum-based products (e.g., fuels, lubricants, and bituminous products) are also used in large amounts in Federal-aid highway construction projects, foreign competition in natural materials was not significant due to their high cost in transportation and petroleum-based products were not available from domestic sources in sufficient and reasonable quantities.

In examining the legislative history of the 1983 Buy America statute, the FHWA found that Congress considered which products should specifically be covered (such as steel, cement, and asphalt), and focused solely on steel and cement. Therefore, the FHWA determined that the best interpretation of congressional intent was that Congress, with the enactment of Section 165 of the STAA of 1982, did not intend to override the existing policy with respect to manufactured products that applied to the 1978 Buy America statute. While Congress subsequently modified the 1983 Buy America statute to repeal the statute's coverage of cement (Pub. L. No. 98-229, Section 10 (1984) and to add coverage for iron (Intermodal Surface Transportation Efficiency Act (ISTEA), Pub. L. No. 102-240, Section 1048(a) (1991)), Congress left the remaining provisions intact.

Additionally, in the preamble to the 1983 final rule, the FHWA noted, and agreed with, statements from commenters who noted the difficulty in tracing the origin of various materials comprising manufactured products. The FHWA further noted comments regarding the difficulty of tracing the origin of steel components and

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<sup>2</sup> Note that the 1983 final rule did not use the term “general waiver.” Instead, the 1983 final rule simply said that the FHWA found it in the public interest to waive the application of Buy America to manufactured products other than steel and cement manufactured products. The term “general waiver” is being used for purposes of this notice to help clarify that the waiver issued for manufactured products in the 1983 final rule is a waiver of general applicability that is not subject to a project-by-project determination.

subcomponents of various manufactured products, such as traffic controllers. After consideration of all the comments, the FHWA found that it was in the public interest to waive the application of Buy America to manufactured products other than steel and cement manufactured products. Subsequently, in a December 12, 1997, memorandum, the FHWA reinforced and clarified the concept of this public interest exclusion by stating that Buy America requirements are applicable to the steel components of predominantly steel products. However, that memo did not define the term “predominantly steel product.”

The American Recovery and Reinvestment Act of 2009 (Recovery Act) brought a renewed interest from public and industry representatives in ensuring that Federal funds were used to support domestic manufacturing. While the “Buy American” provisions of the Recovery Act Section 1605 did not apply to the Federal-aid highway program, the FHWA took great efforts to ensure that Buy America provisions were included and enforced on all Recovery Act projects.<sup>3</sup>

As a result of this heightened awareness, construction project inspection staff and audit representatives spent significant resources in examining compliance with Buy America requirements for all steel or iron products. Compliance issues were noted regarding manufactured products that contained miscellaneous steel or iron components such as light bulbs, sinks, toilets, faucets, tie wires, lifting hooks, traffic controller mounting brackets, nuts, bolts, washers and screws. Many of these products would

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<sup>3</sup> Title XII of the Recovery Act specifically stated that Recovery Act funded highway projects were to be administered as if apportioned under chapter 1 of title 23 U.S.C. Therefore, Recovery Act -funded highway projects were administered under the FHWA’s traditional Buy America requirements in 23 CFR 635.410 instead of the Recovery Act specific Buy American provisions codified in 2 CFR Part 172.

typically have been labeled as miscellaneous steel components or steel subcomponents comprising part of a manufactured product that would have been subject to the general waiver granted in the 1983 final rule.

Nevertheless, continuing requests for clarifications regarding Buy America requirements during Recovery Act implementation and National Review Team oversight efforts led the FHWA to issue a memorandum on December 21, 2012. Moreover, given the broadened scope of the Federal-aid highway program since 1983 as well as the evolution of technologies, products, and construction methods used in highway and bridge construction, the FHWA felt that issuing some guidance to clarify the existence and use of this waiver was prudent. This December 2012 memorandum was intended to clarify the long-standing policy regarding the application of Buy America requirements to steel or iron manufactured products as it related to the waiver granted for manufactured products in the 1983 final rule. Since the existence of this waiver is found in the preamble of the 1983 rulemaking document with very little other guidance available regarding its existence and application, the FHWA wanted to ensure that FHWA Division Offices were aware of the existence of the waiver and that the waiver was consistently applied. The memorandum specifically identified a list of products that are subject to Buy America requirements, defined the term predominantly steel or iron manufactured product by a 90 percent content requirement, and provided examples of miscellaneous steel or iron products.

However, this correspondence has triggered opposition from various groups in the manufacturing industry. Also, a bill has been introduced in the House of Representatives (HR 949) that would require the FHWA to reexamine the agency's standing nationwide

Buy America waivers by issuing a notice and request for public comments on the continuing need for these waivers. While the FHWA maintains that the agency has not changed the application or scope of the manufactured products waiver, the FHWA agrees with the intent of HR 949 that, due to the age of the manufactured products waiver, it is prudent to seek public comments as part of a review of the continued need for this waiver.

The FHWA supports the application of Buy America in the most effective and efficient manner possible. The application of Buy America is most effective and efficient whenever it is applied to products that are available from domestically produced sources in sufficient and reasonably available quantities and of a satisfactory quality. As stated in the 1983 final rule, the FHWA found that the waiver of Buy America to manufactured products does not have any significant impact since manufactured products comprised a small percent of the highway construction program. With this notice, the FHWA is reevaluating this finding and requesting comments on the manufactured products waiver as well as the needed parameters of the waiver if continued.

The most prevalent materials used in highway construction can be included in four major material categories: bituminous products, Portland cement products, aggregates, and steel products. Based on a report titled “Distribution of Costs on Federal-aid Highway Construction Contracts Over \$1,000,000 on the National Highway System Reported During Calendar Year 2004” (the last year for which data was available), the approximate value of the materials used as a percentage of the overall value of all construction contract was as follows: bituminous products (7.8%), Portland cement products (0.7%), aggregates (17.8%) and steel products (4.8%)



(<http://www.fhwa.dot.gov/policy/ohim/hs04/htm/costpie.htm#alt1>). Of these materials, it appears that only steel/iron products would be appropriate for consideration under the public interest waiver provisions available under 23 U.S.C. 313.

The market conditions and assumptions that led to FHWA's decision not to include oil products (bituminous products or asphaltic cement) in the November 25, 1983, general waiver still exist today. Petroleum and petroleum-based products that are permanently incorporated in a project (such as asphalt cement) are generally not available from domestic sources in sufficient and reasonably available quantities. In the preamble to the 1983 final rule, the FHWA noted that over 200 comments were received regarding the application of Buy America provisions to oil products and virtually all commenters asked that oil and/or petroleum products and/or asphalt be exempt from coverage.

As noted above, Congress specifically modified the 1983 Buy America statute to repeal the statute's coverage of cement. Aggregates and other natural materials, such as sand, stone, and gravel are used in large quantities in highway construction; however, foreign competition is very limited due to the difficulty and high cost of transporting these heavy materials over long distances. Thus, subjecting these products to Buy America requirements will place an undue administrative burden on State DOTs in ensuring Buy America compliance and could unnecessarily delay, or even halt, projects for difficulties in tracing the origin of all items used to manufacture these products. Moreover, some of the ingredients used to make concrete products, such as Portland cement in concrete or asphalt cement in bituminous concrete, are not domestically manufactured in sufficient and reasonably available quantities to meet the demand for these products.

Thus, the application of Buy America to only steel and iron products seems to have the highest potential of realizing the intent of the Buy America statutory provisions in protecting the domestic manufacturing industry. The FHWA has applied, and intends to continue to apply, Buy America to predominantly steel and iron products delivered to a project site for permanent incorporation into that project. This includes predominantly steel and iron products that are incorporated into precast concrete products.

Additionally, for items that may be comprised of steel and iron components or subcomponents, the application of Buy America to the steel and iron in these items would have no impact because the availability of these items are not driven by the demands of the needs for highway construction. For example, some projects, such as in the construction and improvement of rest areas, may involve the incorporation of light bulbs. Light bulbs are not made special for highway construction and, thus, there is no way to trace where the steel and iron that is incorporated into a light bulb is manufactured. The same problem is attendant with other products, also involved in the construction and improvement of rest areas, such as faucets and door hinges. The preamble to the 1983 final rule cited the example of a traffic controller as a manufactured product, where it would be inconsistent with the public interest to apply Buy America requirements. In general, traffic controllers and traffic management hardware and equipment are examples of manufactured products that are composed of multiple components and subcomponents whose origins are difficult, if not impossible to trace.

#### *Vehicles*

One example of the broadened scope of the Federal-aid highway program involves the Congestion Mitigation and Air Quality Improvement (CMAQ) Program.

The CMAQ program was created under the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, Pub. L. No. 102-240, and is codified at 23 U.S.C. 149. The CMAQ Program provides annual apportionments to States for projects or programs that will contribute to attainment or maintenance of the national ambient air quality standards (NAAQS) for ozone, carbon monoxide (CO), and particulate matter (PM). One type of CMAQ project that is being programmed at a growing rate by State, local governments, and private sector sponsors is acquisition of fuel efficient and low emission vehicles and equipment. With recent developments in clean fuel and low emission technologies as well as broader production and availability of these types of vehicles in the U.S. market by the automotive industry, the FHWA is seeing an increased demand to use CMAQ funds to purchase these vehicles and associated items, such as construction equipment and locomotives.

The FHWA currently has not established a Buy America policy for these types of projects. While vehicles are a manufactured product, with the increased use of CMAQ funds for these types of projects, the FHWA has recently determined that the Buy America program is appropriate to apply to these types of projects. For example, the FHWA granted conditional waivers given to Alameda County, San Francisco County, and Merced County, CA, for vehicle purchases on November 21, 2011, notices (76 FR 72027 and 76 FR 72028) and March 30, 2012 (77 FR 19410). These waivers were granted upon the condition that the final assembly of the vehicles occur in the United States. However, the FHWA did not apply a domestic content standard to these waivers. A vehicle manufacturer relies on numerous international sources for various components and it is virtually impossible to track the specific country of origin for small steel

components and subcomponents even though a manufacturer can certify where the final assembly of the vehicle occurs. The difficulty of tracing and documenting domestic manufacturing processes for every manufacturing step for all components and subcomponents illustrates the need for the public interest exception provided by 23 U.S.C. 313(b).

The FHWA was, and remains, uncertain whether such a domestic content requirement would further the objectives of the CMAQ Program in encouraging State and local entities to pursue clean fuel technologies. Moreover, the FHWA has no data to determine what such a content standard should be. Also, the practicality of establishing such a limit for just the iron and steel components in vehicles or equipment is questionable. The FHWA is unaware of any method the agency can use to determine where the components and subcomponents, including the steel and iron contained in the steel and iron components of a vehicle, were manufactured. Similarly, the FHWA has no basis for defining the point of final assembly for vehicles as well as vehicle retrofit projects.

### **Ferry Boat Equipment**

On February 9, 1994, FHWA published a notice in the Federal Register (59 FR 6080) announcing a nationwide waiver of the Buy America requirements for certain steel products used in the construction of ferry boats. The FHWA granted this waiver after publishing a notice in the Federal Register (58 FR 33295) and requesting comment for which two comments were received. The items included in the waiver are marine diesel engines, electrical switchboards and switchgear, electric motors, pumps, ventilation fans, boilers, electrical controls, and electronic equipment. Other steel and iron products used

in the construction of ferry boats that are manufactured domestically are not waived, including steel and stainless steel plate and shapes, sheet steel and stainless steel, steel and stainless steel pipe and tubing, and galvanized steel products. The FHWA has not reevaluated the continuing need for this waiver since it was issued in 1994. Based on the FHWA's present knowledge, however, the FHWA has no information that would lead us to believe that domestic manufacturers of the waived ferry boat components are now available. The FHWA invites comments on the continuing need for this nationwide waiver.

### **Pig Iron and Processed, Pelletized, and Reduced Iron Ores**

On March 24, 1995, FHWA published a notice in the Federal Register announcing a nationwide waiver of the Buy America requirements for certain components used in the manufacturing process for steel and iron products. The specific components include pig iron and processed, pelletized, and reduced iron ores. The FHWA granted this waiver after publishing a notice in the Federal Register (59 FR 43376) and requesting comment for which 10 comments were received. Based on the findings of a nationwide review, and a review of the comments submitted in response to the waiver proposal, the FHWA believed that the supply from domestic sources of pig iron and processed, pelletized, and reduced iron ore was not adequate to permit full compliance with the Buy America requirements. The FHWA has not reevaluated the continuing need for this waiver since it was issued in 1995. Based on the FHWA's present knowledge, however, the FHWA has no information that would lead us to believe that the supply of domestic pig iron and processed, pelletized, and reduced iron ore is

adequate to meet the needs of domestic steel and iron manufacturers. The FHWA invites comments on the continuing need for this nationwide waiver.

### **Minimal Use Exclusion**

One regulatory criterion that was addressed in the November 25, 1983, final rule to implement the public-interest exclusion provision of 23 U.S.C. 313(b) is the minimal use provision in 23 CFR 635.410(b)(4). This provision allows for a minimal amount of non-domestic steel to be incorporated if “. . . the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater.” However, this provision requires the contracting agency to maintain a running list of non-domestic steel or iron components or subcomponents as a construction project proceeds. The threshold amounts have not been revised since the November 25, 1983, final rule and managing the documentation of compliance with this threshold can be problematic on large, complex projects.

One potential method of easing the inspection and reporting burden on contracting agencies for Buy America compliance would be to raise the minimal use threshold; however, there is no clear approach for doing so. Consideration could be given to raising the \$2,500 threshold by a multiplier related to relevant producer price indices for steel or iron products or relevant cost indices for highway construction. In either case, it is difficult to establish an index that is representative of all of the iron and steel products that are used in the Federal-aid highway program. The multiplier could be as high as 2.5 (based on the Producer Price Index Commodity information for iron and steel products for the period 1983 to 2013 for group WPS101).

(<http://data.bls.gov/pdq/querytool.jsp?survey=wp>). The FHWA invites comment on the

continuing need for the minimal use threshold contained in the regulations. For commenters believing that this provision continues to be needed, the FHWA requests comment on whether the monetary threshold should be raised and the appropriate method of doing so.

### **Invitation for Public Comment**

The FHWA requests public comment and input on issues related to the application of Buy America requirements to manufactured products, including various manufactured products that include steel or iron subcomponents. Specifically, the FHWA invites public comment on the following issues:

1. Has the nature of the Federal-aid highway program and the U.S. steel/iron manufacturing industry changed to such a degree that FHWA needs to reconsider its criteria for applying Buy America requirements to manufactured products?
2. Are there specific or general types of manufactured products that should not be covered by a public interest waiver and why?
3. Are there specific or general types of manufactured products that should be covered by a public interest waiver and why?
4. Are there specific issues that should be considered for manufactured products that include steel or iron components and subcomponents? Should the FHWA continue to distinguish manufactured products that are comprised predominantly of steel and iron for purposes of requiring all manufacturing processes to occur in the United States? How should a predominantly steel and iron product be defined? Should the FHWA continue to consider a predominantly steel and iron product as one comprising 90 percent steel and iron?

5. Should vehicles be subject to Buy America? If so, what types of vehicles? How should the FHWA define vehicle? Should the definition of vehicle include construction equipment, such as street sweepers, backhoes, refuse trucks, dump trucks, graders, etc.? Should the FHWA broaden the definition of vehicle to include bicycles, electric bicycles, and neighborhood vehicles? Also, what standard should the FHWA apply (i.e., final assembly in the U.S.)? For final assembly, what constitutes final assembly? Should there be a domestic content threshold? If so, what content should be covered (i.e., steel and iron or all content comprising a vehicle) and what should the percentages be? Should there be different percentages for different types of vehicles? What data is available to support the use of a percentage? What types of vehicles would be available to State and local agencies at any given percentage?
6. Should vehicle retrofits be subject to Buy America? If so, what standard should be applied? Should the standard differ from that of a whole vehicle (i.e., if final assembly is the standard for a vehicle, should the FHWA be concerned about Buy America when an engine is purchased on its own for incorporation into a vehicle)?
7. What standard should apply to locomotives, rail cars, and locomotive parts that are purchased for locomotive retrofits? Should the FHWA require the application of the Federal Railroad Administration's policy, which views locomotives and rail cars as "end products" that must be assembled in the United States and all components (including components purchased for retrofits) be manufactured in the United States?



8. Do the minimal use threshold provisions of 23 CFR 635.410(b)(4) represent reasonable criteria for expressing the public interest exclusion limitations for the Federal-aid highway program, and present an appropriate balance between an undue administrative burden in accounting for every steel and iron item in a project versus giving effect to the intent of Buy America?
9. Are there any domestic suppliers available that can domestically produce pig iron and processed, pelletized, and reduced iron ores in sufficient quantities of a satisfactory quality to supply the entire need for Federal-aid highway projects?
10. Are there any domestic suppliers available that can domestically produce ferry boat equipment in compliance with the FHWA's Buy America requirements?
11. If any of the general waivers (manufactured products, ferry boat equipment, and pig iron) to Buy America are rescinded, what would be the implications to administering Federal-aid highway projects?
12. What would be the potential advantages or disadvantages of FHWA adopting a policy for manufactured products similar to that used by many Federal agencies who implemented the Recovery Act Buy America requirements? (Note: 2 CFR 176.70(a)(2)(i) states: "Production in the United States of the iron or steel used in the project requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to iron or steel used as components or subcomponents of manufactured goods used in the project.")

Issued on:

July 3, 2013

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Victor M. Mendez

Federal Highway Administrator

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